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IN THE

Supreme Court of the United States

OCTOBER TERM—1966

No. 857

PHILIP MARX,

Petitioner,

vs.

LOUIS JAFFE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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IN THE

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OCTOBER TERM—1966

No. _____

PHILIP MARX,

Petitioner,

vs.

LOUIS JAFFE,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of New Jersey

The petitioner, Philip Marx, prays that a Writ of Certiorari issue to review the order of the Supreme Court of New Jersey denying certification to petitioner to review the judgment entered by the Appellate Division of the Superior Court of New Jersey on August 5, 1966.

Opinions Below

The opinion of the trial court entered December 15, 1964 is not officially reported and is printed in the Appendix filed in the court below and is also printed as Appendix A herein. The first Opinion of the Appellate Division, decided

February 23, 1966, remanding case to the trial court to make additional findings of fact, is not officially reported and is printed in the appendix filed in the Court below and is also printed as Appendix B herein.

The second Opinion of the Appellate Division, decided August 5, 1966 is officially reported in 92 N. J. Superior Reports 143,—Atl. Rep. 2—; and is printed herein as Appendix C.

At. Rep. 2d—is printed as Appendix C herein.

The order of the Supreme Court of New Jersey, denying certification, was entered on October 4, 1966 and is not officially printed as yet and is printed as Exhibit E herein.

Jurisdiction

The denial of the petition for certification by the Supreme Court of New Jersey (court of last resort) to review the opinion and judgment of the Appellate Division was entered on October 4, 1966.

The Jurisdiction of this court is invoked pursuant to 28 U. S. Code, Section 1257(3).

Question Presented

May a State court (whose powers have been expressly limited by statute merely to review orders and determinations of an administrative agency) (Milk Control Board) on its own initiative (and in the absence of any proceedings instituted by or before the agency) take primary jurisdiction and declare forfeit a $13,260.00 judgment by reversal, because of an attempted circumvention of a civil penalty statute, over which the agency has by legislative grant, exclusive statutory regulatory and enforcement powers).

a. May it impose a larger penalty than that prescribed by statute?

Constitutional Provisions Involved

United States Constitution

Amendment V.

> "No person shall be deprived of life, liberty or property, without due process of law."

Amendment 14th, Section 1, Clause 3.

> "Nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction equal protection of the laws."

New Jersey State Constitution

Article III, Par. 1. Branches of Government.

The powers of the government shall be divided among three distinct branches, the legislative, executive and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in the Constitution.

Article 1. Par. 1.

> "All persons are by nature free and independent and have certain material and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of pursuing and obtaining safety and happiness."

Statute Involved

State Statute involved is New Jersey Statutes Annotated 4:12A-30. It is set out at pages 5-6 of the Statement.

Statement

New Jersey, like some other states, has pursuant to N. J. S. A. 4:12A-1 to 4:12A-58 enacted milk control legislation and has invested the Milk Control Board of the office of Milk Industry of the Department of Agriculture with exclusive powers to fix minimum prices of milk, regulate conditions and terms of sale, hold hearings, and bring suit for penalties for violations of any of the statutes or rules or regulations of its agency in the county or district courts for the benefit of the State and generally given the Director of that Agency broad powers of superintendency over the regulation of the entire milk industry in the state and pursuant to N. J. S. A. 4:12A-8 imposed upon the Director of the agency the duty to enforce the provisions of the statute and pursuant to N. J. S. A. 4:12A.12 specifically limited the Superior Court merely to review orders and determinations of that Director. (See full text of statutes —Appendix F.)

Plaintiff sued defendant in the Superior Court of New Jersey, Law Division, to recover the sum of $13,000.00 loaned to him in July and August 1962, represented by three checks made to his order which he accepted. There was no other written evidence of this loan transaction.

The parties had known each other for some years prior to this loan and at the time of the loan agreement plaintiff was the president of Clinton Milk Co. (hereafter called "Clinton") which was engaged in the sale at wholesale of milk and milk products in the City of Newark, New Jersey.

Defendant on and after July 1, 1962 was associated with U-Neck Super Markets (hereafter called "U-Neck") as an officer, manager and stockholder.

Defendant sought this loan to assist him in financing the prospective operations of U-Neek which plaintiff hoped to secure as a customer for Clinton.

The loans were made directly to the defendant since the plaintiff had more faith in defendant's ultimate ability to repay rather than to a newly organized corporation.

The arrangements for repayment of the loan were that defendant personally assumed ultimate liability for repayment but the loan was to be amortized by means of a credit of 10% to be given defendant on all purchases of milk (price fixed by the Office of Milk Industry) and all other products of Clinton (such as sour cream, buttermilk, etc. not price fixed) thereafter to be made by U-Neek of all of Clinton products.

Thereafter Clinton sold its products to U-Neek until February 1963 when U-Neek made an assignment for the benefit of its creditors at which time Clinton was owed $1,200.00 for goods sold and delivered prior thereto.

Thereafter plaintiff brought suit against defendant to recover the sum of $13,000.00 loaned to him. The defendant contended the loan agreement was made with U-Neek and not with him and was intended as advance rebate on all future purchases to be made by U-Neek of Clinton's products and that this loan agreement and terms of repayment were void and could not be enforced since it was in violation of N. J. S. A. 5:12A-30 which forbids rebates or secret agreements between licensees or other persons whereby the price of milk (price fixed) is reduced (below the minimum established by the Office of Milk Industry) as a result of such agreement or rebates.

The Statute N. J. S. A. 4:12A-30 is herein set out at length.

> "No licensee or other person, association or corporation shall hereafter contrary to the public interest operate in any municipality under any mutual

> or secret agreement, arrangement, combination, contract or common understanding with any other licensee or person, firm or association, or corporation, whereby *the price for milk* to be paid to producers in this State is reduced or the *price* to be paid by dealers, processors, subdealers, stores, or consumers *for such milk is decreased in pursuance of such mutual or secret agreement, arrangement, combination, contract or common understanding* and each such contract, arrangement, agreement or understanding is hereby prohibited and declared to be contrary to the public interest and in restraint of trade and commerce, and shall *subject the violator or violators to the penalty in this act prescribed; . . .* " (emphasis supplied)

At the time of the trial it was found that U-Neek had purchased about $10,000.00 worth of Clinton's products to the time U-Neek had made an assignment for the benefit of its creditors and the plaintiff upon disclosure of this fact, the Court, sitting without a jury, gave defendant a credit of $1,000.00 on account of the loan of $13,000.00 and entered a judgment for $13,260.00 in favor of the plaintiff against the defendant (adding interest from date of filing of the complaint), and determined that the loan was made to the defendant and that he personally assumed liability for repayment and found that even if a violation of the statute had occurred the loan agreement was enforceable nevertheless, and that only the Director of the Milk Control Board could bring proceedings to enforce the statutory prescribed penalties, upon proof of violation and that in the posture of the relationship between the parties, this statute had no applicability.

On appeal by the defendant to the Appellate Division of the Superior Court, after the submission of briefs and oral argument, the case was remanded to the trial court to make additional findings of facts, among others, as to whether plaintiff intended to circumvent N. J. S. A. 4:12A-30 in employing the method of repayment by crediting defendant with 10% on all purchases made by U-Neek of Clinton's products, and upon return to the Court of the additional findings of facts, further reserved decision, and requested a copy of the unreported opinion of the case of *Clinton Milk Company* v. *Chuven,* Superior Court, Law Division, Docket L 7359-55 (upon which decision the trial court substantially relied).

The Appellate Division then reversed the judgment entered in favor of the plaintiff in the sum of $13,260.00 and entered judgment in favor of the defendant and disregarded the legislative limitations of its powers to merely review orders and determinations of the Milk Control Board (N. J. S. A. 4:12A-12) and the provision for enforcement of penalty powers delegated exclusively to said agency by the Legislature (N. J. S. A. 4:12A-7 and 8) and held that the loan agreement was in violation of N. J. S. A. 4:12A-30 and was an attempt to circumvent that statute and the plaintiff was therefore barred from recovery because he was in "pari delicto". It disagreed with the trial court's conclusion that only the Director of the Milk Control Board had the power to enforce violations of the statute and held that the Court had similar powers to enforce violations (without any citation of statute or case to support this declaration).

All this, despite the lack of any proper findings of fact by the trial court or the Appellate Division that the plaintiff had actually violated the statute, namely, that the

agreement to amortize the debt by a credit to defendant of 10% on all products purchased by U-Neek of Clinton *decreased* the net price of the milk sold (price-fixed) below the then established minimum prices set by the Office of Milk Industry in July and August 1962, at time loan agreements were made. The Court further declared the loan agreement was so tainted with illegality so as to render it void and unenforceable despite the plain language of the statute (N. J. S. A. 4:12A-30) which provides "that any violation shall subject the violator or violators to the penalty in this act prescribed" (referring to monetary penalties of $50.00 for the first offense, $200.00 for the second offense, revocation or suspension of license or other penalties, the enforcement of which are left exclusively to the Director of the Milk Control Board. See N. J. S. A. 4:12A-39 and 4:12A-44—Appendix F.

Additionally the Court failed to define the term "price" as used in the statute and failed to cite any case to justify its right to usurp the functions of the Milk Control Board or any criminal or civil statute which renders void and unenforceable the loan agreement made betwen the parties. On Petition for Certification to the New Jersey Supreme Court to review the judgment of the Appellate Division, same was denied, without opinion or hearing, despite the allegations in the Petition that the action of the Appellate Division was extra-judicial and void, since it was specifically limited by statute from taking original jurisdiction in any matter, involving any violations of the Milk control statutes, and despite the further fact that the case at bar marked the first instance since the enactment of milk control legislation in New Jersey in 1933 that the Superior Court had taken original jurisdiction of a case involving a charge of violation of the Milk Control statutes, prior to a determination by the Milk Control Board, that a violation had occurred.

Reasons for Granting *Certiorari*

The Petitioner seeks a reversal of the judgment of the Appellate Division entered below, declaring forfeit the $13,260.00 judgment entered in the trial court because:

1. The action of that Court is *coram non judice* since the Superior Court of New Jersey has no primary or original jurisdiction in matters involving the regulation of the milk industry and the enforcement statutes pertaining to that industry because the Court's powers are expressly limited by statute merely to review orders and determinations of the Director of the Milk Control Board.

(a) The usurpation by the Court of the agency's functions and powers constitutes an unlawful encroachment by the judiciary upon the powers of the State legislature and a violation of the triunity powers of government.

(b) The action of the Court being extra-judicial and void constitutes the "taking of property without due process of law" and "the impairment of the obligations of a contract" made between parties in violation of the New Jersey and U. S. Constitutions.

Special Reasons for Certification

The reversal of a judgment in the sum of $13,260.00 entered in the trial court, because of an alleged attempt to circumvent a civil penalty statute which by statute prescribes a fine of $50.00 for the first offense constitutes an anomaly in the law and a gross act of injustice.

POINT I

The Appellate Court's action, by declaring forfeit a $13,260.00 judgment by reversal, was extra-judicial and void and in contravention of both the New Jersey and U. S. Constitutions as well as the New Jersey statutes.

Article III, Par. 1 New Jersey State Constitution provides for the separation of the three branches of government, judicial, legislative and executive and provides that no person belonging to any one branch shall exercise any of the powers properly belonging to either of the others.

The New Jersey State legislature has vested exclusively in the Director of the Milk Control Board of the Office of Milk Industry of the Department of Agriculture board superintendency powers to regulate the entire milk industry in all its operations from the farmer to the consumer level (N. J. S. A. 4:12A-1 to 4:12A-58); to fix prices of milk (minimum), regulate conditions and terms of sale and hold hearings to determine if any violations have occurred of any of the milk control statutes or rules and regulations of the agency, and if after hearings and determinations, a violation has been committed, it is then empowered to bring suit in the county or district court to recover a judgment for the benefit of the State Treasurer, no more than $50.00 for the first offense or $200.00 for the second or subsequent offense, pursuant to N. J. S. A. 4:12A-39 and 4:12A-41 (see full texts—Appendix F) or take other action pursuant to N. J. S. A. 4:12A-44 to restrain habitual violators by court injunction.

See *Abbott's Dairies, Inc.* v. *Armstrong;* 14 N. J. 319, 102 Atl. Rep. 2-272 (Sup. Ct. 1954) and *Burlington Food Stores, Inc.* v. *Hoffman,* 45 N. J. 214, 212 Atl. Rep. 2-29

(Sup. Ct. 1965) for an exposition of the agency's plenary powers.

Not only does the Superior Court lack any legislative grant to entitle it to maintain original jurisdiction in matters involving violations of the milk control statutes but on the contrary, the Legislature has specifically foreclosed it of such power by narrowly restricting its jurisdiction to merely review orders and determinations of the agency. N.J.S.A. 4:12A-12.

It further provided in N.J.S.A. 4:12A-8 that any duly authorized appointee of the Director of Milk Control Board is charged with the duty of enforcement of all of the provisions of the Milk Control Act and in N.J.S.A. 4:12A-7 declared that the board and director are the instrumentalities of the state for the purpose of attaining the ends in this Act declared and the board and director are vested with powers as provided in this act (See full text of statutes, Appendix F). All of which above cited statutes clearly indicate the legislative intention to charge the Director of the Milk Control Board with exclusive powers to enforce the provisions of N.J.S.A. 4:12A-1 to 4:12A-58, including of course 4:12A-30, the statute, *sub judice*.

The question then presents itself:

Was the action of the Appellate Division in declaring forfeit the judgment by reversal of same, proper? The answer must unquestionably be in the negative, since obviously the forfeiture of the judgment was a form of penalty imposed by the Court, albeit an enlargement of the penaalty that could be visited upon the plaintiff upon proof of violation after a hearing and determination was had by the regulatory agency and suit brought by it in the county or district court to recover same pursuant to N.J.S.A. 4:12A-39 and 4:12A-41.

This same answer was furnished by Mr. Justice Harlan in *U. S.* v. *Western Pacific R.R. Co.*, 352 U. S. 63, 64, 77 S. Ct. at p. 165 when he delineated the interrelationship of courts and administrative agencies at p. 165.

> "The doctrine of primary jurisdiction like the rule requiring exhaustion of administrative remedies, is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone. Judicial interference is withheld until the administrative process has run its course.
>
> "Primary jurisdiction, on the other hand, applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which under a regulatory scheme, have been placed within the special competence of an administrative body. In such a case the judicial process is suspended pending referral of such issues to the administrative body for its views."

In *Cooper* v. *Reynolds*, 77 U. S. Reports (Sup. Ct. 1870) 308, 316, 19 L. Ed. 931, this Court in defining a test of a court's jurisdiction stated:

> "By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought, and this is conferred by the sovereign authority which organizes the courts, and is to be sought for in the general nature of its powers or in the authority specially conferred."

Also in *Vallely* v. *Northern F & M Ins. Co.*, 254 U. S. Reports, 346, 355, 65 L. Ed. 297, 298 (1920) this Court dealt with the limitation of a court's power and stated:

> "Courts are constituted by authority and they cannot go beyond the powers delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable but simply void, and this even prior to reversal."

In determining the scope of the legislative grant given to the Director of the Milk Control Board as indicated by all of the statutes cited above and the express limitations placed upon the Superior Court to merely review orders and determinations of that agency, it is thus apparent that the transaction between the parties herein was uniquely within the competence and sphere of the exclusive delegated powers of the Board since the statute N.J.S.A. 4:12A-30 enjoins "a licensee or other person"—and the regulation of the sale and resale of milk is one of the specific enumerated powers of the Director. See N.J.S.A. 4:12A-21.

It thus follows, *a fortiori*, that the action of the Appellate Division in declaring forfeit a $13,260.00 judgment, was by a court lacking jurisdiction to do so, and constituted a void judicial act (*coram non judice*) and the "taking of property" without due process of law, in violation of the 14th Amendment, Sec. 1, Clause 3, as well as the New Jersey State Constitution, Article III, Par. 1, which creates a triunity of the powers of government and a prohibition against encroachment of one branch by either of the others.

The Court below in its opinion stated "that if the contract be still executory, it will not enforce it and if already executed it will not restore the status *quo ante.*" and added the further general proposition of law "that the law will not assist either party to an illegal contract. The parties being in *pari delicto* it will leave them where it finds them." None of these generalities have any relevancy to the instant case. This general proposition of law (*pari delicto*) may be applicable in the absence of a statute prescribing penalties for the violation of an act, although see *U. S.* v. *Evans,* 333 U. S. 483, post.

But in the instant case, the Legislature has set up a regulatory administrative agency to superintend the entire milk industry. *Abbott's Dairies* v. *Armstrong,* 14 N. J. 319, *supra,* and spelt out the violations for which that agency may bring the violator to task and prescribed with specificity the penalties that may be imposed and designated the courts in which actions to recover penalties may be brought and designated the State Treasurer as the beneficiary of any monetary penalties recovered.

Therefore, the specious doctrine of "*pari delicto*" must yield to the dictates of the statutory scheme of enforcement and to the exclusivity of the administrative forum to enforce them from a consideration of the act as a whole and the specific commands of the Legislature. Otherwise, what security or reliance can be placed in the law, if a Court could on the basis of some specious legal theory frustrate completely a statutory scheme of prescribed penalties; usurp the administrative agency's exclusive statutory enforcement powers and impose a larger penalty than that prescribed by statute (motivated perhaps by its dissatisfaction with the modest prescribed statutory penalties).

This type of judicial action hardly commends itself to "due process of law" and the doctrine of the "separation of the powers of the legislative, judicial and executive."

Had the Legislature intended to nullify any loan obligation involving a conflict with N.J.S.A. 4:12A-30 they could have done so easily by enactment or amendment.

This proposition was succinctly stated by this Court, in *Union National Bank of St. Louis* v. *Missouri,* 97 U. S. 621, 25 L. Ed. 188, 189, 190, in construing a statute:

> "The statute does not declare such security void. It is silent upon the subject. If Congress so meant, it would have been easy to say so; and it is hardly to be believed that this would not have been done, instead of leaving the question to be settled by the uncertain result of litigation and judicial decision."

And, at p. 190 citing *Harris* v. *Runnels,* 12 How. 79, this Court further stated that:

> "The statute must be examined as a whole to find out whether or not the makers meant that a contract in contravention of it was to be void so as not to be enforced in a Court of Justice."

So also in *U. S.* v. *Evans,* 333 U. S. 483, 68 S. Ct. 634, 92 L. Ed. 823 (1948) wherein this Court held that where a statute fails to provide a penalty, it is beyond the power of the court to prescribe a penalty.

For all of the above reasons, it is submitted that the action of the Appellate Division in declaring forfeit the judgment of $13,260.00 entered in the trial court was *coram non judice* and violative of both the New Jersey State and United States Constitution as well as the New Jersey statutes.

POINT II

The Appellate Division erroneously concluded without proper proof that plaintiff had violated or attempted to circumvent N.J.S.A. 4:12A-30 and thus its judgment of reversal violated the "due process clause" of the 14th Amendment of the U. S. Constitution.

The trial court found that the loan transaction was not in violation of N.J.S.A. 4:12A-30 which finding was disregarded by the Appellate Division.

What is meant by the word "price" in that statute, which may not be decreased, which the Courts failed to define. A reading of the whole act indicates that it can only mean the minimum prices for milk which the Director is empowered to fix, pursuant to N. J. S. A. 4:12A-22. It was therefore most pertinent for the trial court and the Appellate Division (despite their lack of statutory authority to make any findings of any violations or enforce violations for the reasons set out in Point I, *supra*) to determine what the established minimum price of milk was in July and August 1962, once having opened up this avenue, and what the sale price of the milk was agreed upon between Clinton and U-Neek before any determination could be made if a violation had occurred of the statute or any circumvention of it.

It well could be that if the parties agreed that Clinton was to sell its milk (price fixed) to U-Neek for example at a price of 24¢ per quart, then despite a discount of 10% on such price (if the then established minimum price was 20¢ per quart), the net selling price would be 21.6¢ per quart, above the established minimum and beyond the interdiction of the statute.

The record is utterly barren of any evidence of the established minimum price or the sale price agreed between the parties at all times that Clinton dealt with U-Neek or at the times the loan agreements were made.

Absent this critical evidence neither court or even the administrative agency could find whether any violation of the statute has occurred or whether any circumvention of the statute was intended by the agreed method of amortization of the loan.

Should this Court then take jurisdiction of the case at bar when the State court failed to make these findings of material facts?

This Court in invoking jurisdiction of a state court decision, in *Brooklyn Savings Bank* v. *O'Neil*, 324 U. S. 697, 703, 65 Sup. Ct. Reporter, 895 stated:

> "The state courts made no findings of facts on this issue. Where a state court fails to pass on evidence or makes findings of facts because under their respective views the facts referred to are immaterial, we are not relieved from the duty of examiinng the evidence for the purpose of determining what facts reasonably might be and presumably would be found therefrom by the state court."

Further, in *Southwestern T & T Co.* v. *Danaher*, 238 U. S. 485, 591, 59 L. Ed. 1419, this Court in reviewing a state court decision penalizing the plaintiff utility $6,300.00 for its refusal to give service to a customer who had prior thereto failed to pay her past due bill, stated (statute provides $100. per day fine for each day's failure to render service):

> "In these circumstances to inflict upon the company penalties aggregating $6,300.00 was so plainly arbi-

trary and oppressive as to be nothing short of taking of its property without due process of law."

So, too, with like effect, *Missouri P. R. Co.* v. *Tucker*, 230 U. S. 484, 491, 59 L. Ed. 1422 (S. Ct. 1914), involving excessive penalties imposed by the State upon a common carrier.

In the case at bar, the statutory prescribed penalty is $50.00 for the first offense and the reversal of the judgment of $13,260.00 constitutes an arbitrary confiscation of plaintiff's property and a taking of property "without due process of law by the Court".

Additionally, the characterization of plaintiff's conduct and innuendoes derived therefrom, as a substitute for proof, as displayed by the Appellate Division's Opinion has no place in any judicial opinion.

The novel concept advanced by the Court below in declaring forfeit a $13,260.00 judgment because it concluded (without any proper proofs thereof) that the parties intended to circumvent a civil penalty statute which prescribes a penalty of $50.00 for the the first offense and other statutorily prescribed penalties (none of which compel declaring null and void a loan obligation between parties)—penalties which can only be imposed after hearings and determinations by the administrative agency, is evidence of the Court's flagrant disregard of the fundamental rules of proof and its own statutory limitations and a flouting of traditional rules of evidence of American Jurisprudence, rules, which we, in this nation, regard as safeguards of judicial proceedings and in which we take just pride.

CONCLUSION

For all of the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LOUIS ASARNOW,
Counsel for Petitioner.

[APPENDICES FOLLOW]

APPENDIX A

Opinion of the Superior Court, Law Division—Fusco, J.

In this suit, the plaintiff seeks to recover from the defendant, Louis Jaffe, on three checks totaling the sum of $13,000, one of which is dated July 10, 1962 for $5,000, the second dated August 1, 1962 for $5,000 and the third dated August 9, 1962 for $3,000. He also seeks to recover interest from the date of the several checks down to date which he claims totals $1,842.50. The defendant seeks to avoid liability on the checks in question on the ground that an oral agreement was made at the time of the delivery of those checks or some time prior thereto for a repayment of the amount of those checks by a credit of ten per cent on any purchases made by Unique Supermarket from the Clinton Milk Company.

The Unique Supermarket being an organization with which the defendant was associated and the Clinton Milk Company being that which the plaintiff was associated with. The plaintiff (?) claims that those purchases and that this activity was in violation of N.J.S.A. 4:12A-30, secret agreement for price reduction prohibited, part of the Milk Control Act, and there was the secret agreement infected with such illegality as to render it unenforceable.

Assuming for the purpose of this decision that this defendant sustained his burden of proof, and that there was an oral agreement that this repayment of the $13,000 advance was to be repaid by a credit of ten percent rebate on the price of milk bought by the Unique Supermarket from the Clinton Milk Company, the question is whether such a rebate was prohibited by the statute at that time.

Appendix A

Now, N.J.S.A. 4:12A-30 provides, "No licensee or other person, association, or corporation shall hereafter contrary to the public interest operate in any municipality under any mutual or secret agreement, arrangement, combination contract or common understanding, with any other licensee or person, firm, association or corporation, whereby the price of milk to be paid to producers in this state is reduced or the price to be paid by dealers, processors, subdealers, stores or consumers for such milk is decreased in pursuance of such mutual or secret agreement, arrangement, combination, contract, or common understanding and each such contract, arrangement, agreement or understanding is hereby prohibited and declared to be contrary to the public interest and in restraint of trade and commerce, and shall subject the violator or violators to the penalty in this act prescribed. . . ." N.J.S.A. 4:12A-35 provides for one of the several penalties which has to do with a suspension of a license where the applicant or licensee has been a party to a combination to fix prices contrary to the provisions of this Act and 4:12A-39 provides for further penalties which indicate a penalty of not more than $50 for the first offense and not more than $200 for the second or each subsequent offense; as well as the seizure for sale of any milk sold in violation of provisions heretofore referred to and the provisions for the manner in which said penalties are to be paid.

The defendant further urges that the transaction was illegal and unenforceable because it represented a loan by an alleged licensee to a customer prohibited by the statute that in order that all unfair trade practices may be eliminated which might harm the producer's interest, and which would tend to reduce a wholesome supply of milk for the

health and welfare of the citizens of this state. No licensee shall give or lend anything of value to any customer served by a licensee or limited to be served by the licensee. Unquestionably the plaintiff is not a licensee, although he is a representative of the licensee and the defendant, himself, is not a licensee although he was an officer and manager and a stockholder of the licensee.

The question that I must determine first is if there is a violation of the statute or any relation thereunder and, secondly, whether such violation, if any, makes void the loan and makes it unenforceable. Frankly, I do not find anything which taints the loan given from the plaintiff to the defendant so as to render it void. The penalty section of the statute heretofore mentioned contributed only a civil penalty for a violation of any of the laws with a further right to injunctive relief against the habitual violators.

In that regard the broad and strong powers to suspend or revoke a license for a violation of the statute is given by N.J.S.A. 4:12A-35. A violation is not a crime, although such is suggested by the defendant when he suggests that in the course of making those loans the plaintiff was conducting a disorderly house at the premises at which the violation took place. The statute is not like the Small Loan Act where there is a declaration that every loan in which any violation has occurred as to interest rate or other charge shall be null and void. *Consolidated Plan of New Jersey* v. *Meyer Shanholtz,* 7 N. J. Misc. 876, Supreme Court, 1928, *Consolidated* v. *Palkowitz,* 107 N.J.L. 517 E. & A. 1931 nor like the provisions of N.J.S.A. 2A:40-3 by which, "all promises, agreements or instruments consideration for which any money property or thing in action whatsoever laid, won or bet in violation of gaming laws

are declared utterly void and of no effect, similar to N.J.S.A. 31:1-3 forbidding the collection of any loan interest where the rate is usurious. As a further comparative example, the Alcoholic Beverage Control Law forbids loans, and similar interests between the brewer and the retailer. N.J.S.A. 33:1-43 as amended without specifying nullity of such obligations, but a violation of the law is made a criminal misdemeanor as well as subjecting the officer to additive disciplinary proceedings affecting the licensee.

The question remains whether the agreement for rebates by express statutory or regulatory provisions is illegal and unenforceable on the grounds it is against the public policy because contrary to a prohibition imposed by administrative regulations or the statute. It is not every agreement or transaction violative of the statute which is ipso facto void as against the vague and variable concept of public policy. The question must be determined in the light of the particular circumstances of each case. The doctrine should be applied with caution and only in cases falling within the reason to which the doctrine applies.

Allen v. *Commercial Casualty Insurance Company,* 131 N.J.L. 479, 1949 was a case arising under the Milk Control Law. We are not dealing with that. We are dealing with a case involving an agreeement.

In *Girard Trust Company* v. *Smith,* 129 N.J.E. 444, 1949. In *Lobeck* v. *Gross,* 2 N.J.L. 100, 1949 or with one where the contract represented an agreement by both parties to preclude the operating of State Policy found in *Houston Petroleum Company* v. *Automotive Products,* 9 N. J. 122. In *Buckelew* v. *Martens,* 108 Law 339, wherein it was held that price fixing agreements among business competitors

are illegal whether in fact a detriment to the public or not, whether for the purpose of making higher prices the public is entitled to have competition and it makes no difference whether the price fixing agreements are reasonable or distinguished from the Buckelew case in that the case is not concerned with price fixing agreements among competitors. The oral agreement in this case concerns not a licensee, any licensee customer, but a third party who may have had a connection with a licensee and a third party defendant who had a connection possibly with a customer.

The defendant cites further *Jacobson* v. *Graves* at 41 N.J.L. 195 where a note was given for a consideration found to be in violation of the Servicemen's Readjustment Act of 1944. In this case the Legislature did not see fit in the Milk Control Law to prohibit loans as it did in the case of rebates. I am not prepared to say that the violation of only a prohibition imposed by the statute renders the transaction nugatory as against public policy. It is interesting to note that the statute definitely does not refer to public policy, but refers to the public interest which makes a differentiation. So under the particular circumstances and representation of parties here and especially in the absence of any statutory prohibitions or a criminal penalty, I fail to find sufficient basis for same, that the public interest is in fact the public policy which makes the obligation null and void and unenforceable. Citing from an unreported opinion *Clinton Milk Co.* v. *Hyman Chuven and Jack Rogerson,* by Judge Hall, March 1, 1957, L-7359-55.

Frankly, I am satisfied that the plaintiff is entitled to recover on the several checks which have been issued and that this plaintiff is entitled to recover only that amount for which those rebates were enforceable. As I see it from

the testimony as adduced on cross-examination and remains undisputed that total purchase were made from the Clinton Milk Company by the Unique Supermarket in the sum of $10,000 at a rate of ten per cent, there should be a credit of $1,000 to the defendant as against the $13,000 leaving a balance due to the plaintiff of $12,000.

Now, the issue now arising as to whether or not under such arrangements any interest is collectable. I find that there was no indication that there would be any interest payable, but that the principal amount would be repaid without interest. With that in mind, I refer to the case of *Jardine Estates* v. *Donna Brook Corporation* at 42 Super 332 Appellate Division, 1956, wherein the Court is given the discretion as to whether interest may be allowed. It holds that "interest should not be allowed where the damages are unliquidated and not capable of ascertainment by mere computation, or where serious and substantial controversy exists as to whether plaintiff was entitled to receive interest at the time of the making of this transaction, and I find that he was not. So that the plaintiff will only be entitled to receive interest from the date of the institution, the date of March 12, 1963, which would be one year so that the plaintiff would be entitled to receive interest in the sum of $1260 which will be added to the principal sum of $12,000.

Judgment will be entered in the sum of $13,260 in favor of the plaintiff and against the defendant.

(Judgment Entered in above Opinion on December 15, 1964.)

APPENDIX B

Opinion of the Appellate Division of the Superior Court, decided February 23, 1966

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-297-64

PHILIP MARX,
Plaintiff-Respondent,

vs.

LOUIS JAFFE,
Defendant-Appellant.

Argued February 10, 1966—Decided February 23, 1966

Before JUDGES GAULKIN, LABRECQUE and BROWN.

MR. RICHARD M. GLASSNER argued the cause for appellant (MR. SALVATORE A. BRANCATO on the brief).

MR. LOUIS ASARNOW argued the cause for respondent.

PER CURIAM

Plaintiff sued for repayment of alleged loans to defendant totalling $13,000. Defendant contended (1) that the monies were not loaned but were advanced to a corporation known as U-Neek Super Market of which he was a principal stockholder, and (2) in any event, they represented

an advance rebate to the corporation under an agreement for the purchase of milk and milk products by the corporation from Clinton Milk Company, a dairy controlled by plaintiff, which agreement was illegal and unenforceable as violative of N.J.S.A. 4:12A-30. *In re E. J. McGovern Dairy Products, Inc.*, 60 N. J. Super. 163 (App. Div. 1959), affirmed o. b. 31 N. J. 601 (1960).

At the conclusion of the trial without a jury the judge determined:

> "Frankly, I am satisfied that the plaintiff is entitled to recover on the several checks which have been issued and that this plaintiff is entitled to recover only that amount for which those rebates were enforceable. As I see it from the testimony as adduced on cross-examination and remains undisputed that total purchase were (sic) made from the Clinton Milk Company by the Unique (sic) Supermarket in the sum of $10,000 at a rate of ten per cent, there should be a credit of $1,000 to the defendant as against the $13,000 leaving a balance due to the plaintiff of $12,000."

Unfortunately we find ourselves unable to decide the points raised in this appeal because of a lack of findings of fact which we deem essential to its determination. *State* v. *LaPierre*, 39 N. J. 156, 165, 166 (1963); *Franzoni* v. *Franzoni*, 60 N. J. Super. 519 (App. Div. 1960). The case is therefore remanded to the trial judge for his findings of fact and conclusions of law upon the following questions:

(1) As to each of the advances which admittedly made up the total sum of $13,000, did the parties agree that this constituted a loan which was to be repaid by defendant?

(2) Did any portion of the aforementioned amount come into the hands of U-Neek? If so, how much and when?

(3) Was it agreed between plaintiff and defendant that the amount of such indebtedness would be reduced by an amount equal to 10% of all sales of milk or milk products made by Clinton Milk Company to U-Neek Super Market? If so, when was such agreement made?

(4) If the answer to (3) is in the affirmative:

(a) Was it the intention of the plaintiff, in advancing the aforementioned sums, to circumvent the provisions of N.J.S.A. 4:12A-30?

(b) Was defendant then acting on behalf of or with the approval of U-Neek? Did plaintiff know he was so acting?

(c) Was such agreement contrary to N.J.S.A. 4:12A-30? If not, why not?

If trial judge wishes to do so, he may take additional testimony. He may also file a supplemental opinion or supplemental findings of fact and conclusions of law. We think that this can be accomplished by March 15. Within 15 days thereafter counsel may file supplemental briefs in letter form with this court. We will then advise counsel whether further oral argument is necessary.

We retain jurisdiction.

APPENDIX C

Opinion of the Appellate Division of the Superior Court, dated August 5, 1966

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-297-64

PHILIP MARX,
Plaintiff-Respondent,

vs.

LOUIS JAFFE,
Defendant-Appellant.

Decided August 5, 1966.

Before JUDGES GAULKIN, LABRECQUE and BROWN.

On appeal from Superior Court, Law Division, Essex County.

MR. RICHARD M. GLASSNER argued the cause for appellant (MR. SALVATORE A. BRANCATO on the brief).

MR. LOUIS ASARNOW argued the cause for respondent.

PER CURIAM

Plaintiff instituted this action to recover on an alleged loan to defendant represented by checks totaling $13,000. Defendant contends that the money received by him did not

constitute a loan, but was, instead, an advance rebate to the U-Neek Super Market (U-Neek), a now bankrupt corporation of which defendant was principal stockholder, under an agreement whereby U-Neek would purchase its milk requirements from Clinton Milk Company (Clinton), a dairy controlled by plaintiff. He urges that this was in contravention of N.J.S.A. 4:12A-30 which precluded agreements whereby the price of milk was reduced below that fixed by the Director of the Office of Milk Industry.

The trial court, sitting without a jury, determined that plaintiff was entitled to recover the amount of the checks issued to defendant, less $1,000 in credits earned by U-Neek under the rebate agreement.

We remanded the matter for further factual findings on questions which we deemed essential to our determination of the appeal. In response to our specific inquiry, the trial court found: (1) checks totaling $13,000 were made payable to defendant personally and he agreed to make repayment; (2) defendant deposited the full amounts in the account of U-Neek; (3) plaintiff and defendant agreed that the latter's indebtedness would be reduced by an amount equal to 10% of all sales of milk or milk products by Clinton Milk Company to U-Neek Super Market; (4) plaintiff's intention in advancing the monies was to circumvent N.J.S.A. 4:12A-30; (5) defendant acted on behalf of U-Neek and plaintiff knew he was so acting. The judge concluded that the parties' agreement was contrary to N.J.S.A. 4:12A-30, but that the penalty provisions of the statute were intended by the Legislature to be exclusive, consequently the agreement was enforceable.

We are in accord with the conclusion of the trial judge that the agreement between the parties was violative of the

statute. The device of couching the rebate agreement between U-Neek, represented by defendant, and Clinton, controlled by plaintiff, in the guise of a personal loan between the individuals does not alter the true nature of the transaction. We also recognize that by instituting this action against defendant personally, plaintiff hopes not only to avoid the impact of N.J.S.A. 4:12A-30, but also to avoid being a mere general creditor of the insolvent corporation, which would be his status had the "loan" been made directly to U-Neek.

Our accord with the trial judge that the agreement violates the statute does not extend to his conclusion that it is nonetheless enforceable because the Legislature had prescribed the exclusive penalties for violations thereof. Violators of the act subject themselves to a penalty of not more than $50 for the first offense and not more than $200 for the second offense, N.J.S.A. 4:12A-39, and the possible suspension or revocation of their licenses. N.J.S.A. 4:12A-35; *In re E. J. McGovern Dairy Products, Inc.*, 60 N. J. Super. 163 (App. Div. 1959).

The fact that the alleged loan transaction contravenes the statute clearly renders the agreement illegal. *Brooks v. Cooper*, 50 N. J. Eq. 761, 771 (E. & A. 1893); *Restatement, Contracts* §580 (1932). However, merely to call a contract illegal is not to state the effects of such illegality. In each case the legislative intent must be sought. *John J. Carlin, Inc.* v. *O'Connor*, 126 N. J. L. 243, 245-46 (E. & A. 1941).

In N. J. S. A. 4:12A-30, the Legislature provided that any rebate "contract, arrangement, agreement or understanding is hereby prohibited and declared to be contrary to the public interest * * * ." This express prohibition of

any bargain which reduces milk prices below the fixed minimum, coupled with the declaration that such bargains are contrary to the public interest, manifests the legislative intention that such bargains are unenforceable and that the statutory penalties are cumulative.

It is said to be an established rule that "the law will not assist either party to an illegal contract. The parties being in *pari delicto,* it will leave them where it finds them. If the contract be still executory, it will not enforce it, and if already executed it will not restore the *status quo ante.*" *Cameron* v. *International Alliance of Theatrical Stage Employees, Local, 384,* 118 N. J. Eq. 11, 20 (E. & A. 1935). The rule finds particular application in this case for two reasons. First, the explicit prohibition of any rebate agreement makes it manifest that such an agreement could not be enforced by one of the parties thereto were it wholly executory. Enforcement would promote the private interest at the expense of the public interest. Second, neither the partial execution in the instant case, nor any other factors, bring this matter within any of the exceptions to the general rule of non-enforceability. See generally, *Restatement, op. cit. supra* §§598-609.

This is not an instance where refusal to enforce or rescind an illegal bargain would produce a harmful effect on the parties for whose protection the law making the bargain illegal exists. In such cases, enforcement or rescission, whichever is appropriate, is allowed. *Id.* §601; *Cameron* v. *International Alliance of Theatrical Stage Employees, supra* at pp. 20-21. Here, on the contrary, the Legislature has expressly determined that the public interest in a constant flow of wholesome milk to consumers requires price regulation. *Abbotts Dairies, Inc.* v. *Arm-*

strong, 14 N. J. 319, 330 (1954). The public interest does not require that the court give either efficacy or consolation to the efforts of a party to an agreement to subvert the administratively determined price structure.

Further, this is not an instance where enforcement commends itself, despite illegality, in order to avoid an unjust forfeiture. See 6A *Corbin, Contracts* §1522 pp. 761-62 (1962). That consideration is inapplicable where the result accomplished by enforcement is expressly prohibited by statute. *Restatement, op. cit. supra* §§600, 603. More importantly, however, there is no unjust forfeiture in the present case. Plaintiff delivered the advance rebate to defendant with knowledge that the monies were to be a fund for U-Neek. Defendant was a mere conduit despite the efforts of the parties to cloak him otherwise. It would be incongruous to reward plaintiff with a position superior to that of the creditors of the now insolvent U-Neek because of his efforts to circumvent N. J. S. A. 4:12A-30.

We have considered the unreported decision in *Clinton Milk Company* v. *Chuven* (Docket No. L. 7359-55), relied upon by the trial court, and find it inapposite. There, at the time of the alleged loan agreement, there was no minimum milk price regulation in effect.

In summary, we hold that the statutory prohibition of rebate agreements requires that no phase of this agreement may be enforced.

Reversed and remanded for the entry of judgment for defendant.

No costs.

APPENDIX D

Order of Mandate on Reversal by Appellate Division (August 5, 1966)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

APPEAL DOCKET NO. A-297-64

PHILIP MARX,

Plaintiff-Respondent,

vs.

LOUIS JAFFE,

Defendant-Appellant.

This cause having been duly argued before this Court by Richard M. Glassner, counsel for the appellant and Louis Asarnow, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court-Law Division-Essex County is in all things reversed, set aside and for nothing holden, withous costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless a Notice of Appeal to the Supreme Court or a Notice of Petition for Certification has been filed or is pending, or unless otherwise ordered by this Court, and that the record

and proceedings be remitted to the said Superior Court-Law Division—Essex County to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division, at Trenton on the 5th day of August, 1966.

MORTIMER G. NEWMAN, JR.
Clerk of the Superior Court

APPENDIX E

Order of the Supreme Court of New Jersey Denying Certification, dated October 4, 1966

SUPREME COURT OF NEW JERSEY
C-47 September Term 1966

PHILIP MARX,

Plaintiff-Respondent,

vs.

LOUIS JAFFE,

Defendant-Appellant.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 4th day of October, 1966.

JOHN H. GILDEA
Clerk of the Supreme Court

APPENDIX F

Full Text of Statutes Pertinent to Milk Control Act

4:12A-2

Milk Control Board: established; first members; term of office. There is hereby established a board to be known as the "Milk Control Board" which shall consist of three members who shall be citizens of this State.

4:12A-4

The board shall appoint a director of milk control for a term of five years. . . .

4:12A-7 General Powers of board and director: orders, rules and regulations

The board and the director are hereby declared to be the instrumentalities of the State for the purpose of attaining the ends in this act declared and the board and director are hereby vested with power as provided in this act. The director shall have power to issue orders, rules and regulations to carry out the objects and provisions of this act, and all such orders, rules and regulations by the director shall be made in his name and over his signature. All orders, rules and regulations by the board on appeal shall be issued by the board.

4:12A-8 Enforcement of act and rules and regulations

Any duly authorized appointee of the director shall, subject to the limitations, herein contained, enforce the provisions of this act and all rules and regulations promulgated by the director and all orders thereunder made by the director. L. 1941, c. 274, p. 718, Sec. 8.

Appendix F

4:12A-9 Appeals: hearings and determination by board: stay

The Board is hereby empowered and charged with the duty to hear, review and determine all appeals by any person, applicant or licensee aggrieved by any act, proceeding, rule, regulation, decision or determination of the director . . .

4:12A-12 Review by Superior Court: bond

Any person, applicant or licensee aggrieved by any order or determination of the board made pursuant to this act may obtain a review of the action complained of by the Superior Court in a proceeding in lieu of prerogative writ which court shall have jurisdiction to suspend, reverse or vacate the order or determination so made by the board. L. 1941, C. 274, p. 719, Sec. 12; L. 1953, C. 5, p. 38, Sec. 33.

4:12A-19 Investigations: Powers of directors

The director shall have power to investigate all matters pertaining to the jurisdiction, distribution, importation, storage, disposal, classification, *sale or resale, conditions and terms of sale or resale,* costs of production, distribution, sale and resale, processing sale for manufacture of milk as defined in this act in the State of New Jersey as may be necessary to carry out the provisions of this act. L. 1941, C. 274, p. 721, Sec. 19. (Emphasis supplied.)

4:12A-21 Powers of director enumerated

The director may fix the price at which milk is to be bought, sold or distributed; regulate conditions and terms of sale, establish and require observance of fair trade practices, supervise, *regulate and control the entire milk in-*

dustry of the State of New Jersey, including the production, importation, classification, processing, transportation, *disposal, sale or resale,* storage or distribution of milk as defined in this act in the State of New Jersey. . . . (Emphasis supplied.)

4:12A-39 Violations of act; penalty; seizure and sale

Any person, who shall violate any of the provisions of this act or the orders, rules and regulations of the director, as adopted from time to time, shall be deemed guilty of a violation of the provisions of this act and shall pay a penalty of not more than $50.00 for the first offense and not more than $200.00 for the second or each subsequent offense, and such penalty, when collected, should be paid to the Treasurer of the State of New Jersey.

4:12A-41 Penalties, Collection of, commitment to jail

The County Courts and the county district courts shall have jurisdiction of actions for penalties under this act and such penalties shall be collected and enforced in a summary manner pursuant to the "penalty enforcement law" (See 2A:58-1). . . .

4:12A-48

The operation and effect of any provisions of this act conferring a general power upon the board or director shall not be impaired or qualified by the granting to the board, the secretary, the director or an employee or agent of the director of this Act, of a specific power or powers, not inconsistent with the provisos contained in paragraph twenty-one of this act. L. 1941, C. 274, p. 737, Sec. 48.